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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHESTER P. SOLING, individually and on behalf of all similarly situated persons,

Petitioner,

v.

JOHN McCAIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX C — REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE CHARLES R. PYLE, FILED NOVEMBER 10, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CV 04-00311-TUC-FRZ (CRP)

CHESTER P. SOLING,

Plaintiff,

v.

JOHN McCAIN, et al.,

Defendants.

REPORT AND RECOMMENDATION

Pending before the Court is Defendants McCain's and Kolbe's Combined Motion to Dismiss the Complaint and Memorandum in Opposition to Plaintiffs Motion for Preliminary Injunction (Docket # 29), which has been joined by Defendant Bacal (Docket # 32).

Plaintiffs lawsuit has been assigned to District Judge Frank R. Zapata. Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Charles R. Pyle for a Report and Recommendation.

On October 29, 2004, Magistrate Judge Charles R. Pyle held oral argument on Plaintiff's Motion for Preliminary Injunction and Defendants' Motion to Dismiss. At the time

of the hearing, Plaintiff withdrew his request for a preliminary injunction (Docket # 18) because the general election was only a few days away. The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order granting Defendants' Motion to Dismiss.

I. BACKGROUND

A. STATEMENT OF THE CASE

Plaintiff Chester Soling is an individual who is registered to vote in Arizona Congressional District No. 8. Defendants are, or were, candidates in the 2004 general election for the office of U.S. Senator from Arizona and U.S. Congressman from Arizona Congressional District 8.

Plaintiff's Amended Complaint principally challenges the lawfulness of the defendant candidates accepting campaign contributions from out-of-state contributors, or, in the case of the candidates for Congressional Representative, from contributors residing outside Congressional District No. 8. Additionally, Soling complains that the individual candidates should not be permitted to contribute to their own campaign in excess of the federal contribution limitations. Plaintiff relies on Article I, Article V, and the Fifth, Fourteenth and Seventeenth Amendments of the Constitution. Plaintiff asserts in his Motion for Preliminary Injunction that he attempted unsuccessfully to meet with Senator McCain and Representative Kolbe. Soling argues he was unable to obtain an appointment with these elected officials because of the overwhelming influence of out-of-state contributors.

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Defendants McCain and Kolbe have filed a Motion to Dismiss, in which Defendant Bacal joins. Defendants argue Soling's Amended Complaint fails to state a claim for relief, defendants are private individuals not participating in "state action," that Plaintiff does not have standing, and federal jurisdiction cannot be based on such a frivolous complaint.

B. MOTION TO DISMISS STANDARD

A claim may only be dismissed under FED.R.CIV.P., Rule 12(b)(6), failure to state a claim only if "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957) (citation omitted); *Cahill v. Liberty Mutual Insurance Co.*, 80 F.3d 336, 338 (9th Cir. 1996)(citation omitted). When considering a motion to dismiss, all material allegations of the complaint, as well as all reasonable inferences, are accepted as true. *Cahill*, 80 F.3d at 338. A plaintiff fails to prove a set of facts that entitle him to relief when he fails to present a cognizable legal theory or allege facts sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1998). However, mere conclusory allegations are insufficient to defeat a motion to dismiss. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). And "the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 852, 854 (9th Cir. 1994) (citation omitted).

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A motion to dismiss for lack of subject matter jurisdiction under FED.R.CIV.P., Rule 12(b)(1) may either attack the allegations of the complaint as insufficient to confer subject matter jurisdiction or attack the existence of subject matter jurisdiction in fact. *Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir.1996). However, when the motion to dismiss is a factual attack on subject matter jurisdiction, plaintiff's allegations are not presumed as true and plaintiff has the burden of proving that jurisdiction does exist in fact. *Thornhill*, 594 F.2d at 733.

II. DISCUSSION

A. LIMITATION ON CANDIDATE'S PERSONAL CONTRIBUTIONS TO HIS OR HER OWN CAMPAIGN

Plaintiff argues, half-heartedly, that defendants are prohibited by the Constitution from exceeding the federal statutory campaign contribution limitations for individual donors. Plaintiff argues that without enforcing this limitation, he is at risk as a voter of having the candidate act in his own self-interest over the interest of his constituency.

Limitations on candidate spending of personal or family resources on his or her campaign have specifically been held

by the U.S. Supreme Court to be unconstitutional in violation of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 51-54, 96 S.C. 612, 650-651 (1976). Campaign finance laws do not increase or decrease the potential for an elected official to act in his own self-interest. The more a candidate relies on his own money, the less he is influenced by outside contributors. *Buckley v. Valeo*, 424 U.S. at 53, 96 S.C. at 651.

Plaintiff's allegation that defendants contribute to their own campaigns in excess of the federal campaign finance limitations does not state a claim for relief. That portion of the First Amended Complaint should be ordered dismissed.

B. FAILURE TO STATE A CLAIM

Plaintiff claims he is entitled to a "republican form of government" and that out-of-state or district contributions defeat that entitlement. The first sentence of the Amended Complaint summarizes Soling's legal premise as follows: "United States Senators and Congressmen have a legal duty to their constituents to not be beholden to anyone other than their constituents."

The Ninth Circuit has already established that there is no legal basis for this supposed duty. *Whitmore v. Federal Election Commission*, 68 F.3d 1212, 1216 (9th Cir. 1995); *see also Vannatta v. Keisling*, 151 F.3d 1215, 1217 (9th Cir. 1998) (implied overruling on other grounds, *Montana Right to Life Assen v. Eddlernan*, 343 F.3d 1085 (9th Cir. 2003)). The law of this Circuit has clearly established that claims based on entitlement to a "republican form of government"

or the prohibition of out of district campaign contributions do not state a claim for relief. *Id.*

The authorities suggested rather casually by Plaintiff are unavailing. Claims under the Fifth or Fourteenth Amendment due process clause require state action. No state law or action of state government is at issue in this case. Defendants are private individuals acting on their own behalf in running for office.

Article V of the U.S. Constitution provides the method to adopt amendments to the Constitution, and provides in pertinent part:

> no State, without its consent, shall be deprived of its equal suffrage in the Senate.

The only purpose of this provision is to prevent the possibility of two-thirds of the States adopting an amendment to reduce the number of Senators in a small state from two to one or none. That would be antithetical to one of the fundamental compromises in the Constitution which established a bicameral legislature. It has nothing to do with a duty to represent constituents exclusively.

Similarly, the Seventeenth Amendment provides for Senators to be elected by popular vote, and provides a method for filling a mid-term vacancy in the Senate. The Seventeenth Amendment provides no authority for Plaintiff's "exclusive duty to constituents" theory.

Plaintiff argues that the basis for the duty can be established during discovery. Duty, however, is a question of law. *Armstrong v. U.S.*, 756 F.2d 1407, 1409 (9th Cir. 1985). Plaintiff has shown no legal authority for the duty he seeks to impose on these defendants. There is none. *Whitmore v. Federal Election Committee*, 68 F.3d at 1216.

The duty Plaintiff asserts could not be enforced and would be contrary to our representative form of government. Plaintiff's position suggests Arizona's Congressional delegation must vote rigidly in the interest of Arizona, as opposed to voting their conscience. Any money appropriated for other states, such as disaster relief, would not be in Arizona's interest, but would be in the country's best interest. If members of Congress pandered purely to the interest of their constituency, little would be accomplished. The Constitution presents the appropriate remedy to this dilemma. When dissatisfied with efforts of a member of Congress in representing his or her constituency, the Arizona electorate can "vote the rascal out."

Plaintiff has suggested no sound legal theory to prohibit out of state campaign contributions. The case law in this Circuit is clear that none exists. Plaintiff's Amended Complaint should be dismissed for failure to state a claim.

C. JURISDICTIONAL ARGUMENTS.

Defendants argued that Plaintiff lacked standing and that the claim was so frivolous that this court can decline jurisdiction. Because of the abstract nature of the harm alleged by Plaintiff, he lacks standing to pursue his claim.

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In order to have standing to make a claim, a plaintiff must establish three elements:

> First, the plaintiff must have suffered an "injury in fact"— an invasion of a legally protected interest which is
>
> a) concrete and particularized
>
> b) actual or imminent, not conjectural or hypothetical.
>
> Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant and not the result of independent action of some third party not before the court.
>
> Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.

Lucan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.C. 2130, 1236 (1992) (citations and internal quotations omitted).

At the pleading stage, as opposed to when considering a motion for summary judgment, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561, 2137.

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Plaintiff argues that he has standing before this court because he has an injury in fact which is concrete, as was found in *Tax Analysts and Advocates v. Shultz*, 376 F.Supp. 889, 898 (D.C.Cir. 1974) (a diminution of an individual's vote and an inability to affect the electoral process are judicially recognized wrongs and are sufficient allegations of actual injury).

While the harm alleged by plaintiffs in the *Tax Analysts* case is very similar to that asserted by Soling, the case itself, however, was very different. In *Tax Analysts*, a particular Internal Revenue Service Revenue Ruling was alleged by plaintiffs to conflict with a holding of the U.S. Supreme Court. The dispute was very definitive. In this case, the dispute is more philosophical than legal, with only strained attempts by Plaintiff to provide legal authority for his proposition.

A case very similar to the instant case is *Froelich v. Federal Election Comm'n*, 855 F.Supp. 868, 870 (E.D. Va. 1994), where the plaintiff was determined not to have standing because he had no case or controversy capable of judicial resolution and his injuries were abstract. In *Froelich*, plaintiffs asserted that defendant candidates for the United States Senate, who accepted contributions from non-Virginia residents, denied a meaningful vote for the office of Senator, were not loyal to Virginians, and gave more interest to wealthier states than their own. *Id.* at 870. The district court, noting that the "allegations of injury are conspicuously devoid of any claim that plaintiffs themselves have or will suffer injury-in-fact as a result of political contributions from non-Virginians," thought the matter was better suited for the legislature to handle, not the judiciary. *Id.*

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The reasoning adopted by the Court in *Froelich* applies equally in this case to determine that Soling does not have standing to bring the claims raised in the Amended Complaint. The claims are too amorphous and the allegations of injury are too speculative to be subject to resolution by a judge or a jury. The balancing of the First Amendment rights of out-of-state contributors with the in-state voter concern that money has the potential to corrupt is best handled in the first instance by the legislature.

Soling also tries to establish standing with his claim that he was denied an opportunity to meet with Senator McCain and Representative Kolbe. Plaintiff would purport to show after discovery that these Congressmen met more frequently with out-of-state contributors than in-state voters. Members of Congress have neither the legal duty nor the physical capacity to meet with all of their constituents. That people who support a candidate, financially or otherwise, would have greater access to the candidate would not be a surprise, nor would it be unlawful. Such facts give no greater definition to the legal dispute or the allegation of harm. This additional factual assertion of Soling's does not support a finding that Soling has standing in this case.

Defendants also argue that this Court lacks subject matter jurisdiction because the federal claims are so frivolous. Because supplemental jurisdiction of state law claims is not requested in this action, and given the Court's recommendation concerning dismissal for failure to state a claim and lack of standing, there is no pragmatic value to determining a lack of federal jurisdiction over this action due to frivolousness. Dismissal on this basis is not recommended.

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Other cases provide a clear example of frivolousness. In *Crowley Cutlery v. United States*, 849 F.2d 273 (7th Cir. 1988), Judge Posner had substantial reason to believe that a criminal defendant's attempt to re-argue a critical legal issue in his case in another circuit was clearly wasting federal judicial resources. In *Franklin v. Oregon*, 662 F.2d 1337 (9th Cir. 1981), one inmate's filing of 32 separate pro se inmate lawsuits was clearly a gross waste of federal judicial resources. In both cases, dismissal for want of jurisdiction over frivolous complaints was upheld. There is no assertion that Plaintiff has filed multiple actions or otherwise unnecessarily beleaguered the federal courts with his claims.

In this case, Plaintiff unsuccessfully tried to rely on specific constitutional provisions instead of suing the Federal Election Commission and attacking a provision of the Federal Election Campaign Act as in *Whitmore*, *supra.* Soling also unsuccessfully attempted to give more definition to his standing claim by alleging his lack of access to two candidates. In this action, Soling had some subtle, though unavailing, distinctions from prior decisional authority. The more appropriate basis for dismissal of this matter is failure to state a claim and lack of standing.

III. RECOMMENDATION

It is the report of this Court that Plaintiff's Amended Complaint fails to state a claim on which relief can be granted and Plaintiff lacks standing. The Court further finds that leave to amend would be futile.

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For the foregoing reasons, the Magistrate Judge recommends that the District Judge, after completing an independent review,

1. **GRANT** Defendants' Motion to Dismiss (Dockets # 29, 32).

2. **ORDER** that this case can be dismissed against all Defendants.

Pursuant to Title 28 U.S.C. § 636(b), any party may serve and file written objections within 10 days of being served with a copy of this Report and Recommendation. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **CV 04-00311-TUC-FRZ.**

The Clerk of the Court is directed to send a copy of this Report and Recommendation to all parties.

DATED this 10th day of November, 2004.

s/ Charles R. Pyle
CHARLES R. PYLE
UNITED STATES MAGISTRATE JUDGE